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Seventieth session (second part)

Provisional summary record of the 3429th meeting
Held at the Palais des Nations, Geneva, on Friday, 13 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagayno

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair drew attention to the programme of work proposed by the Bureau for the remainder of the Commission's seventieth session. He said he took it that the Commission wished to approve that programme.

It was so decided.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

The Chair invited the Commission to resume its consideration of the first report of the Special Rapporteur on protection of the environment in relation to armed conflicts.

Mr. Nolte said he agreed with the Special Rapporteur that the protection of the environment in situations of occupation resulted from an interplay of the law of occupation, international human rights law and international environmental law, where the law of occupation functioned as *lex specialis*. He was also in favour of the Special Rapporteur's proposal to draft principles formulated in general terms applicable to all forms of occupation. It could be made clear in the commentary that the exact scope of a particular obligation would depend on the nature and duration of the occupation. He concurred that the meaning of some terms of the law of occupation could evolve over time.

He supported the contents of draft principle 19 (1), as reformulated by the Special Rapporteur in her oral presentation. The terms "environmental considerations" could be further elaborated in the commentary, along with "administration", which might include the exercise of delegated authority by private actors. While he basically agreed with paragraph 2, he wondered whether it should not also require the occupying Power to respect the occupied State's international legal obligations with regard to environmental protection. As it stood, that paragraph tracked article 43 of the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) of 1907 and article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), both of which reflected the conservationist principle which, at that juncture, had sought primarily to preserve domestic law, whereas environmental protection was currently shaped by international agreements as well. Even though the word "legislation" might be construed as including international legal obligations, it might be advisable to insert the phrase "and its international obligations" after "legislation".

Like Mr. Hassouna, he thought that draft principle 19 could be strengthened by inserting a third paragraph along the lines of the second paragraph of guideline (5) of the Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, so that it would read: "Obligations of the occupying State under international agreements and customary law pertaining to the protection of the environment may continue to be applicable in situations of occupation to the extent that they are not inconsistent with the applicable law of armed conflict." That wording would be in line with the Commission's draft articles on the effects of armed conflicts on treaties, draft articles 6 and 7 and annex (g) to (i) of which carried an implication that treaties on environmental protection continued in operation, in whole or in part, during armed conflict.

While he generally endorsed draft principle 20, it might be advisable to recast it slightly since, as the Special Rapporteur had acknowledged in paragraphs 93, 94 and 97, the legal value and exact content of the term "sustainable use" was controversial. In many of the cases quoted in paragraph 95, where international courts or tribunals had referred to that term, they either did not attach a specific legal value to it, or it was used in the context of a treaty containing it. The relationship between draft principles 20 and 19 (1) was also questionable, especially with regard to usufruct. As the Special Rapporteur had indicated, some of the possible interpretations of "sustainable use" regarded it as a broader concept than the concretization of usufruct.

Nevertheless, he was in favour of retaining the term "sustainable use" because it had been employed, in terms of "sustainable development", by the International Court of Justice

in *Gabčíkovo-Nagymaros (Hungary v. Slovakia)* and in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. The Court had considered it to be an apt expression of the need to reconcile economic development and the protection of the environment. The notion itself and its underlying rationale were also applicable in a situation of occupation. Furthermore, the need to balance economic development against other objectives in a situation of occupation had been reflected in the rules on usufruct in article 55 of the Hague Regulations. The Special Rapporteur was correct in contending that the term "sustainable use" was the modern equivalent of usufruct. The principle of usufruct predated most norms of international environmental law, but in the shape of "sustainable development" it was sufficiently broad to accommodate legal developments since 1907, including the right to retain permanent sovereignty over natural resources. Paragraphs 97 and 98 of the report provided excellent guidance on how the term "sustainable use" should be used in the context of the topic under consideration. However, in order to meet the concerns of some members, the Special Rapporteur should further clarify its meaning in the commentary. It should be interpreted in light of the right to permanent sovereignty over natural resources as permitting the exploitation of natural resources solely "for the benefit of the population". That position was corroborated by paragraph 249 of the 2005 judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.

While he generally agreed with the formulation of draft principle 21, which was apparently drawn partly from the judgment in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the wording "damage to ... areas beyond national jurisdiction" seemed somewhat unusual, as he was unsure whether an "area" as such could be damaged. It was also unclear why the Special Rapporteur proposed the term "significant damage" rather than the more widely used term "significant harm". "Significant damage" was normally used in the contexts of attribution and compensation, whereas "significant harm" was contained in many texts, including the Commission's articles on prevention of transboundary harm from hazardous activities and the judgment of the International Court of Justice in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The proposal made by Ms. Galvão Teles to consider wording taken from the last sentence of paragraph 29 of the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* merited further examination.

Lastly, he recommended referring all three draft principles proposed in the report to the Drafting Committee.

Mr. Petrič said that the Commission must be mindful of the fact that the nature of conflicts and occupation had altered since the adoption of the Hague Regulations in 1907 and the Fourth Geneva Convention in 1949. The use of armed force by States had been prohibited by international law and, for that reason, occupation resulting from any such use of force, save in cases of self-defence or when authorized by the Security Council, was illegal and could not give rise to any rights, under the principle of *ex injuria jus non oritur*. The population of an occupied territory was therefore entitled to resist the illegal rule of the occupying Power, as its administration was inconsistent with self-determination.

While he was not opposed to the Special Rapporteur's approach or the draft principles which she had proposed, he wondered why she had failed to make any reference to the illegality of occupation, since that might have a bearing on the legal aspects of protection of the environment in a situation of occupation. That issue should be dealt with at least in the commentary.

More research was needed into treating the protection of property as an indirect means of protecting the environment, as a distinction should be drawn between private property and State-owned property. Moreover, in the Second World War, the population of occupied territory had resisted by destroying property, infrastructure and food. Such action could probably not be deemed unlawful under contemporary international law of occupation.

The Special Rapporteur had taken the view that the principle of self-determination could be invoked in relation to the exploitation of natural resources in occupied territories and had based her reasoning on the findings of the International Court of Justice in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied*

Palestinian Territory. However, it was not clear what constituted the substance of the right to self-determination, what its relationship was with other principles embodied in the Charter of the United Nations, what its scope was, or how it could be implemented. He therefore agreed with Mr. Rajput's observations in regard to self-determination and the exploitation of natural resources in the context of occupation.

On the other hand, he was very much in favour of approaching the topic via human rights law. Human rights, including those connected with the environment, certainly applied in the event of armed conflict and occupation. The occupying Power was bound to protect the human rights existing in the occupied territory before occupation and it was also bound by its own human rights obligations. In the case of lengthy occupation, the issue of the standard of human rights protection might arise if the occupying Power's standard of human rights and environmental protection was higher than that of the sovereign State of the occupied territory. He agreed with the distinction drawn by Mr. Murase between belligerent occupation and long-lasting stable occupation. That was indeed a matter which should be elucidated in the commentary.

As events in Kosovo, Iraq, Afghanistan, or even Korea, had shown, the North Atlantic Treaty Organization (NATO) or other entities or forces acting under the authority of a Security Council resolution could function *de jure* or *de facto* as occupying Powers. That meant that the legal aspects of environmental protection during occupation also had implications for international organizations, which should be spelled out at least in the commentary.

Turning to the draft principles themselves, he considered that it might be useful to add an introductory draft principle to part four stating that in all cases of occupation, the existing rules of international law concerning the protection of the environment must be respected. A principle or a commentary should define what was meant by occupation in the context of the topic. It would be wrong to restrict protection of the environment to cases of classical occupation covered by the Hague Regulations or the Geneva Conventions relating to the protection of victims of international armed conflicts. The phrase "or any other occupying actor" should be added after the words "occupying State" where appropriate in the draft principles, or at least in the commentary thereto. Attention should also be drawn in the commentary to the distinction between legal occupation resulting from the lawful use of armed force authorized by the Security Council or in exercise of the right of self-defence and illegal occupation following the unlawful use of armed force in violation of *jus cogens*.

He welcomed the plan for future work, as the problems arising in non-international armed conflicts were extremely relevant to the Commission's work and required in-depth study. Matters related to responsibility and liability for environmental harm caused by armed conflicts were of central importance to the topic. It would certainly be very helpful to have a preamble and some definitions.

He was in favour of referring all the draft principles to the Drafting Committee on the understanding that the version of draft principle 19 would be that proposed by the Special Rapporteur in her oral presentation.

Sir Michael Wood, while agreeing with much that had been said by Mr. Park, Mr. Murase, Mr. Murphy and others, said that he disagreed with some of the more far-reaching proposals made. He would like to emphasize that the topic did not concern occupation in the broadest sense, but the protection of the environment in relation to armed conflict.

Chapters I, II and III of the Special Rapporteur's first report included an elaborate treatment of some major issues that extended well beyond the present topic: international humanitarian law applicable in occupied territories in the widest sense, going far beyond environmental aspects; the law of occupation, which was part of the law of armed conflict; the relationship between international humanitarian law and international human rights law, which was a vast subject; and whether the conventional and customary rules of international law relating to the environment were applicable to situations of occupation. It was not always obvious which paragraphs of the report were specifically relevant to the three relatively modest draft principles proposed; it would be important to be clear about that when drafting the associated commentaries. It was to be hoped that the commentaries

would be short and would focus on explaining the wording of the draft principles, without seeking to expand on broader issues.

On a related note, it was sometimes far from obvious how some of the situations referred to by previous speakers were relevant to the topic. Some speakers had mentioned various situations, past and present, either to illustrate a point, or more often — it seemed — simply to mention them. In some cases it was far from obvious how far the situations referred to were relevant to the current topic. Disputed territory was not the same as occupied territory.

As to the scope of the topic, Mr. Murase had clearly explained the distinction between belligerent and pacific occupation. While politicians might prefer to avoid the words "belligerent occupation", it was the correct term in law and was covered by the topic as an element of armed conflict. Whether the topic should be extended to cover other situations that could be loosely referred to as occupation despite being removed from armed conflict, such as the situation in Kosovo pursuant to resolutions of the United Nations Security Council, was less obvious. The major issue of what was meant by "environment" in the context of the topic had also been left open for the time being; whatever definition was used, however, references to whether an occupying Power could increase oil consumption, or to the protection of private property, might be out of place.

He agreed with those who had questioned how realistic it was to expect peacetime obligations and standards relating to the environment and human rights to be applied in time of belligerent occupation, where the primary obligation was to ensure, as far as possible, public order and safety. Some of the ideas advanced ignored even such basic principles of the law of armed conflict as military necessity. The Special Rapporteur's more modest approach was preferable.

The rationale underlying draft principle 19, as set out in the report, was sound, but it would be useful if the Special Rapporteur, in summing up, could expand on the origin of her new proposed wording and its implications. The notion of a "general" obligation was not entirely clear, and it might be more appropriate to word the draft principle such that the occupying Power "should" respect the environment. Environmental considerations should clearly be taken into account by the occupying Power in respect of the occupied territory, but what that meant in practice would need to be determined case by case. The express reference to "any adjacent maritime areas" was unnecessary and potentially incorrect. Whether such areas fell within the occupied territory or not was essentially a question of fact and could be explained in the commentary. The Drafting Committee would need to consider paragraph 2 of draft principle 19 very carefully: the Hague Regulations were to be read together with the Fourth Geneva Convention and other rules of international law.

Draft principle 20, with its reference to "sustainable use", might go beyond the scope of the topic. Moreover, the lack of clarity on the notion of sustainable development might lead to opposite interpretations of the text. Mr. Murphy considered that the wording might preclude the use of natural resources by the occupying Power, which was allowed under usufruct, while Mr. Rajput regarded the concept of sustainable use as broader than usufruct, as set out in article 43 of the Hague Regulations. The reference to minimizing environmental harm seemed to be covered by the wording of draft principle 19. Draft principle 20 might therefore be superfluous, as any necessary elements could be covered in draft principles 19 and 21 and dealt with in the commentary.

Draft principle 21 covered the "no harm" principle, which had been extensively addressed by the Commission in the context of its 2001 articles on prevention of transboundary harm from hazardous activities. Although others had questioned the use of the phrase "all the means at its disposal", he had no objection to restating that principle, subject to careful consideration of the wording by the Drafting Committee.

He agreed that draft principles 19 to 21 should be referred to the Drafting Committee.

Mr. Šturma said that he was in general agreement with the approach taken by the Special Rapporteur in her first report and with most of the draft principles she had proposed. The report addressed protection of the environment from three perspectives: under the law

of occupation; through international human rights law; and through the continuing application of international environmental law.

Although the traditional law of occupation, as codified in the Hague Regulations, still broadly informed the rights and obligations of an occupying Power, it was not particularly helpful in terms of protection of the environment, which had not been considered a matter of international law at the time when the Regulations had been adopted. The same held true for other instruments of the law of armed conflict, including the Fourth Geneva Convention. The first explicit rules on protection of the environment had appeared in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). He therefore understood why the Special Rapporteur had referred to protection of property rights and usufruct but he agreed with Mr. Park that those concepts had only limited impact on the protection of the environment *per se*. He did not, however, question the relevance of protection of the environment in the context of military occupation: the old law of occupation must be interpreted in the light of more recent rules of international law, including humanitarian, human rights and environmental law, to the extent that they were applicable in situations of occupation. In that regard, the references made to advisory opinions of the International Court of Justice and to the Commission's 2011 draft articles on the effects of armed conflict on treaties were useful.

In addition to the Hague Regulations, which set out the general concept of occupation and some basic rules, particularly in article 43, common article 2 of the Geneva Conventions of 1949 should also be taken into account. The cumulative conditions defining a state of occupation, taken from the International Committee of the Red Cross commentary of 2016 on common article 2 and reproduced in paragraph 23 of the report, were broad enough to include various situations of occupation, both short-term and long-term. The key element was the physical presence of a State's armed forces in a foreign territory without the consent of the local government in place at the time of the invasion and the fact that the foreign forces were in a position to exercise authority over the territory concerned. However, introducing the concept of "pacific occupation", or occupation by agreement, was not helpful. Provided that such agreement was not imposed through the use or threat of force, rendering it void *ab initio*, the presence of foreign forces would be governed by that agreement rather than by the general international law of occupation. The consent of the territorial State and the treaty basis were what served to distinguish the legal regime of a foreign military presence and foreign bases from the general law of occupation. Another possible basis for the presence of foreign military forces was a binding resolution of the Security Council. For the purposes of the present topic, most situations were covered by draft principles 7 or 8, which had already been provisionally adopted by the Drafting Committee and noted by the Commission.

It remained conceivable, despite the approach to agreements on the status of forces or missions and to peacekeeping operations taken in draft principles 7 and 8, that an international organization might be involved in military occupation, depending on certain legal and factual conditions. Under their statutes, not all international organizations had competence in military matters. Even more important was the issue of whether an organization had the means to exercise control over an occupied territory. It would depend on effective control and command, which might remain with the international organization, as the European Court of Human Rights had concluded in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* in relation to Kosovo, or with a single State or a collation of States, as in *Al-Jeddah v. the United Kingdom* with respect to Iraq. Although all three cases had concerned the application of the European Convention on Human Rights, the distinction might be equally relevant to applying international environmental law in situations of occupation.

As the concept of occupation applied only to international armed conflicts, he agreed with the Special Rapporteur's choice to address protection of the environment in non-international armed conflicts separately in a future report; however, certain non-State actors might be involved indirectly in the issues dealt with in the draft principles proposed so far. The obligations of an occupying State should be limited to the territory under its effective control. If a resistance movement in the occupied territory caused, by its own actions,

environmental harm within that territory or to another State, the occupying State could hardly be responsible for such damage.

He agreed with the amended version of draft principle 19 (1) proposed by the Special Rapporteur in her introductory statement. Both Mr. Park and Mr. Murphy had made important points with respect to paragraph 2 of that draft article. Given the importance under the law of occupation of respecting the legislation of the occupied territory, the phrase "unless absolutely prevented" was insufficient: the potential exceptions to respecting that legislation should be developed in more detail. Moreover, such measures should not be arbitrary and must take into consideration the interests of the occupied population, which was also important in view of the emphasis placed in the report on the application of human rights law.

Draft principle 20 was more problematic. Although very concise, it attempted to capture at least two different concepts: the sustainable use of natural resources in an occupied territory and the minimization of environmental harm. Both could be deduced from modern international environmental law, but it was less clear whether they applied fully to the situation of occupation. The concept of sustainable development — usually understood as "meeting the needs of the present without compromising the ability of future generations to meet their own needs" — was a concept proposed in the 1980s to reconcile the tension between economic development and protection of the environment. It had no clear definition and was not a legal principle from which legal obligations of States could be derived. If the term was to be retained in draft principle 20, the text should be reworded. The fact that an occupying State had no sovereignty over the territory it occupied had a bearing on its right to administer and use natural resources in that territory: its rights and obligations as an administrator were much more limited than those of the territorial sovereign. The term should be qualified to the effect that the occupying State could administer and use certain natural resources but should do so in a sustainable manner.

The reference in draft principle 20 to minimizing environmental harm was fundamentally an expression of the "no harm" principle. Given the context, and the scope of application of draft principle 21, it would be better expressed as an obligation not to cause "significant" harm to the occupied territory itself as a result of activities carried out by the occupying State. Draft principle 21 reflected an obligation that was part of international environmental law and one with which he agreed in principle; nevertheless, it was something to be expected of occupying States in situations of prolonged occupation similar to the situation in peacetime, rather than during armed conflicts.

He recommended referring all the draft principles proposed to the Drafting Committee.

Mr. Peter, welcoming the smooth handover of the topic from Ms. Jacobsson, the former Special Rapporteur, to Ms. Lehto, said that he took exception to the manner in which the Commission was addressing the issue of occupation, which, for States that had once been occupied, was an extremely serious one. However the law was interpreted, it was questionable that an occupying Power had any legitimacy or right to exploit the natural wealth and resources of an occupied people. Most occupying Powers acted like common thieves. They stole the natural resources of the occupied people, whether those resources took the form of oil, gas, minerals or forest products. An occupation remained an occupation regardless of whether an adjective such as "pacific" or "belligerent" was used to qualify it.

Mr. Gómez-Robledo had listed a number of territories that were or had been occupied either by States or by organizations, including the Saharawi Arab Democratic Republic, South Ossetia, Kashmir, Nagorno-Karabakh, Tibet and Kosovo. He would add that the 2002 Constitutive Act of the African Union allowed it to intervene in a member State in certain situations. Thus, as other Commission members had argued, it was certainly possible for a territory to be occupied by an organization.

Experience showed that all occupations were combative in nature. It was not possible for a people to enjoy friendly relations with its oppressor. It was for that reason that many countries around the world commemorated the day on which they had gained

independence from their occupiers. It was important to approach the Special Rapporteur's report with that understanding of occupation in mind.

The Special Rapporteur had selected a number of important areas of international law to link with armed conflict and occupation. He would not attempt to examine the protection of the environment through the rules of the law of occupation, which were by and large never respected by the occupier. Occupying Powers never assumed their duty under article 43 of the Hague Regulations to restore and ensure public order. Occupiers had a different agenda, and there was little sense in engaging in theoretical speculation in that regard. It was owing to occupation that Iraq and Libya were currently in such a dire situation. Numerous other examples could be provided.

He fully endorsed the Special Rapporteur's decision to raise the issue of property rights in relation to environmental destruction and in particular the link that she drew between property rights and well-established principles such as that of sovereignty over natural resources.

The Special Rapporteur had made clear that the list of "properties" given in article 55 of the Hague Regulations, namely "public buildings, real estate, forests, and agricultural estates", was not exhaustive and applied to all immovable property not used for military operations. It was therefore not necessary to debate exactly what was included in that list. The important point was that the natural resources of a territory did not belong to the occupier.

In its judgment on the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had asserted that the principle of permanent sovereignty over natural resources was not applicable to "the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State". He wished to align himself with Judge Abdul Koroma, who, in a separate declaration on the case, had rightly noted that permanent sovereignty over natural resources remained in effect at all times, including during armed conflict and occupation. Thus, the fact of occupation in no way altered the status of the natural wealth and resources of an occupied people. The International Court of Justice had looked into the question of whether an occupying Power could exploit the natural resources of an occupied territory for the benefit of the local population, but one might wonder how, in such circumstances, it would be determined what proportion of the natural resources exploited by an occupying Power should remain in the occupied territory and what proportion should be sent back to the capital of the occupying State to cover the administrative costs of running the occupied territory.

The right to health was an important consideration, since environmental degradation usually had a serious impact on the health of an occupied population. That was a fact that required little legal justification. Nevertheless, as detailed in paragraph 64 of her report, the Special Rapporteur had identified solid case law from almost every region in the world to make that point. That case law underscored the connection between environmental degradation, on the one hand, and the human rights to life, family life, health and food, on the other. It was important to highlight the specific rights of the occupied population because its health and well-being were not among the occupier's priorities.

He had expected the Special Rapporteur to specifically address the right to food in the context of occupation. He noted that, in the select bibliography contained in her report, the Special Rapporteur had included several works relating to the right to food, including a seminal work edited by the late Katarina Tomasevski. He was not claiming that she had ignored the right to food, but he was requesting that it should be given the attention that it deserved. Food was often used as a weapon in situations of war or occupation, including against the occupied population. One danger was that access to food might be made conditional on the so-called pacification of the population. Situations of war also prevented the population from engaging in farming or other forms of food production, which increased its vulnerability. The Special Rapporteur noted that the fundamental purpose of article 54 (2) of Protocol I additional to the Geneva Conventions of 1949, which was quoted in footnote 170 of her report, was to protect the civilian population and to prevent policies that could starve out civilians or cause them to move way. He would therefore urge

the Special Rapporteur to consider addressing the right to food in the context of occupation. Lack of access to food forced people in times of war and occupation to engage in such activities as prostitution. In addition, food was sometimes made artificially scarce in times of war. In that connection, he would draw attention to the legal problem of the "grudge informer" case, which had given rise to an interesting debate between H.L.A. Hart and Lon L. Fuller on the relationship between a legal system and justice or morality.

The proposed draft principles were by and large rather abstract in nature. It might be necessary to introduce some amendments to them before they were referred to the Drafting Committee.

He supported the new formulation of draft principle 19 (1), as proposed by the Special Rapporteur. With regard to draft principle 19 (2), the words "unless absolutely prevented" should be deleted. He did not agree with the justification that the Special Rapporteur had provided for that draft principle in her opening statement. First, he was not sure that environmental rights were recognized in more than 100 constitutions. The constitutions of most countries focused on civil and political rights rather than on economic, social and cultural rights. However, article 24 of the African Charter on Human and Peoples' Rights did establish a people's right to a general satisfactory environment favourable to its development. Secondly, he was not sure that the constitution in force in a given territory would continue to apply in the event that it became occupied. With the exception of the right to life, the rights provided for in constitutions were often not protected under occupation. For those two reasons, he suggested that a more precise formulation was needed.

Draft principle 20 was also not satisfactory. It should be made clear that natural resources should be administered for the benefit of the local population. It could, for example, read: "An occupying State should administer natural resources in an occupied territory for the benefit and well-being of the local people in a way that ensured their sustainable use and minimized environmental harm." Although he would not insist on that exact formulation, it was important to capture that general idea.

Concerning draft principle 21, he would suggest deleting the word "significant", as its inclusion would give rise to unnecessary debate.

With regard to the future plan of work, the Special Rapporteur had omitted an issue identified by the Working Group on the topic, namely the responsibility of non-State actors. In the modern world, most wars were fought by proxy, by non-State actors on behalf of States. Military contractors and mercenaries played a role in all wars and would soon be involved in the occupation and administration of territories on behalf of their clients. That issue should be addressed in the draft. In that connection, he wished to draw the Special Rapporteur's attention to the written version of his statement, which offered examples of cases in which military contractors had been hired by States and provided references to relevant literature. He had no objection to any of the other issues that the Special Rapporteur had proposed for inclusion in the second report.

In conclusion, he recommended referring the proposed draft principles to the Drafting Committee in the hope that it would improve them.

Mr. Huang said that he would be grateful if Mr. Peter could clarify the meaning of his reference to Tibet in the context of a discussion of occupation. Tibet had been an inalienable part of China since the time of the Yuan dynasty beginning in the late thirteenth century.

Mr. Rajput said that he agreed with Sir Michael Wood's comments on the references by certain Commission members to specific territories in the course of the debate. With regard to the references to the occupation of Kashmir in particular, he could only assume that Commission members had been referring to the occupation of the territories in question by Pakistan.

Mr. Peter said that he had mentioned Tibet simply as one of the territories listed by Mr. Gómez-Robledo.

The Chair said that, regrettably, Mr. Gómez-Robledo was not present at the current meeting and could therefore not respond to Mr. Huang's comment.

Mr. Cissé said that he wished to congratulate Ms. Lehto on a well-documented and instructive first report. However, one highly important aspect that had not been addressed in the report was that of non-international armed conflicts, or internal armed conflicts. Such conflicts remained a major cause for concern in Africa, and led not only to human losses, but also to environmental degradation in the broadest sense of the term. That aspect would have to be addressed in the second report, but he nevertheless wished to underline the importance and urgency of legislating or at least adopting principles to govern the protection of the environment in relation to internal armed conflicts and to situations in which part of a country's territory was occupied by rebel military forces. In the light of the many conflicts that were taking place or had in recent decades taken place in Africa, it was necessary to clarify the responsibilities and obligations attributable to such forces in the event that they occupied a territory and thereby caused enormous damage to the environment.

He would take the example of his own country, Côte d'Ivoire, which, in 2002, had experienced an armed rebellion that had caused the northern and central parts of its territory to fall under the occupation of so-called rebel forces. The occupation had lasted nearly 10 years, and its environmental effects had been more than catastrophic. In such situations, it was unclear how the perpetration of environmental crimes by rebel forces that, in his view, had acted as an occupying Power should be dealt with under international law, even if the conflict remained an internal armed conflict. To his knowledge, the rules of international humanitarian law currently applicable to internal armed conflicts did not include specific provisions that clarified the responsibilities and obligations of the parties during and after an internal armed conflict. In Côte d'Ivoire and elsewhere in Africa, the massacres committed by rebel forces — which he would not hesitate to describe as environmental crimes — were, as far as he was aware, not currently subject to regional or international regulation.

Even more complex were situations in which an internal armed conflict acquired an international character through the presence of neutral and impartial forces whose main objective was to oversee a ceasefire and to bring and maintain peace. In general, such forces deployed considerable resources in terms of equipment and civilian and military personnel, which could cause severe environmental degradation. It was unclear, in such situations, how the responsibilities and obligations of the combatants and neutral parties would be determined; who should pay for the restoration of the damaged environment; and to what extent the operations of international neutral and impartial forces — such as the blue helmets and the French forces of Operation Licorne in the case of Côte d'Ivoire — contributed to the degradation of the environment. Those were some of the many questions that remained unanswered in the context of the international law on protection of the environment, and it would be possible to identify the applicable principles in the second report.

With regard to future research on the topic, it would in his view be appropriate to take into account the work of the United States Africa Command, which had for several years conducted capacity-building activities with a focus on protection of the environment in relation to armed conflicts, both international and non-international. The United States Africa Command initiative brought together the military, judicial, administrative and other authorities of various West African States in a spirit of cooperation with a view to raising awareness of the effects of armed conflicts on the environment and identifying measures that could be taken to reduce or eliminate them.

Turning to the proposed draft principles, he believed that draft principle 19 raised conceptual issues that made the text difficult to understand. The expression "territorial State" seemed too vague and even tautological in the sense that every State was already inherently territorial. In other words, it was not legally possible to conceive of a State without a territory, as the territory remained a constituent element of the State. However, the inclusion of "adjacent maritime areas" in draft principle 19 (1) seemed appropriate. While some Commission members, including Mr. Murase and Mr. Park, had suggested deleting the reference to maritime areas, he was in favour of maintaining it, as the territory of a State

included its land, maritime and aerial territory. The law of occupation did not alter that reality in the sense that it did not limit the exercise of the occupying State's powers in accordance with the nature of the territory concerned.

The reference to the "sovereign rights" that a territorial State was entitled to exercise over any adjacent maritime areas was problematic. Either a territorial State was coastal, in which case the concept of sovereign rights in draft principle 19 (1) would apply, or it was landlocked or without a coastline, in which case it would not, as a State without a coastline could not exercise such rights within the meaning of the United Nations Convention on the Law of the Sea. In addition, not all adjacent maritime areas were governed by the concept of sovereign rights. The Convention established different legal regimes according to the nature of the maritime areas under the jurisdiction of a coastal State, and those terminological distinctions should not be overlooked if the paragraph was redrafted to include maritime territoriality.

Draft principle 20 was focused on the protection of the environment in terms of sustainable use and the minimization of environmental harm. While he did not wish to downplay the importance of those two aspects, the obligations imposed on occupying States should not be limited to the administration of natural resources. In his view, the obligation to protect the environment should be supplemented with an obligation to protect the economic and social development of the occupied State and its population.

He recommended referring the proposed draft principles to the Drafting Committee.

Mr. Grossman Guiloff said that the proposed draft principles were of particular contemporary relevance given the numerous, often protracted, situations of occupation witnessed around the world. The critical importance of protecting and preserving the environment did not cease in times of armed conflict or during an occupation. He appreciated the Special Rapporteur's work to clarify principles from concurrently applicable branches of the law of armed conflict, human rights law, and environmental law. He particularly welcomed her comments on the relevance of draft principle 6, on protection of the environment of indigenous peoples, to the issue of occupation. As Mr. Gómez-Robledo had noted, the practice of the inter-American system regarding protection for indigenous peoples could be instructive in determining the obligations of the occupying State. In the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and *Sawhoyamaxa Indigenous Community v. Paraguay* cases, for example, the Inter-American Court of Human Rights had recognized a positive duty for States, pursuant to article 21 of the American Convention on Human Rights and principles of general international law, to respect and preserve the rights of indigenous peoples to property, culture and access to traditional sites. Thus, even beyond the legal obligation of the occupying State to restore public order in situations of occupation, as enshrined in article 43 of the Hague Regulations, there might also be a heightened duty in such situations with respect to the environmental impact on indigenous peoples. He hoped that that relationship would be fully addressed in the commentaries.

It seemed that Commission members generally agreed with the principle, articulated by the International Court of Justice, regional courts and treaty bodies, that protection under human rights law did not cease to exist in times of occupation. In such situations, human rights law was applied in conjunction with international humanitarian law. While there might be tension between those two branches of international law, that did not mean that the law of armed conflict overrode human rights law in all matters; rather, the notion of complementarity came into play, as noted by the Special Rapporteur in paragraph 57.

He agreed with the Special Rapporteur's treatment of the issue of derogation in times of occupation. Of course, under the Geneva Conventions of 1949, military necessity was the prevailing consideration. However, even under the law of armed conflict, military necessity was to be evaluated against the principles of proportionality, the distinction between civil and military targets and potential collateral damage. On the other hand, human rights law, which prevailed in peacetime, obliged States to align their actions with the interpretation of the law that was most beneficial for the protection of human rights. The concurrent application of those branches of law necessarily required a balance to be struck between issues of military necessity and human rights, including protection of

environmental rights. Article 15 of the European Convention on Human Rights, article 27 of the American Convention on Human Rights and article 4 of the International Covenant on Civil and Political Rights all provided that States could suspend certain rights, including those related to health and the environment, in times of emergency if there was a threat to the life of the nation, but only in limited ways and for the time strictly required by the exigencies of the situation. It was therefore difficult to maintain that an occupation automatically triggered derogation of human rights norms. Indeed, as had been noted, the International Court of Justice had addressed that specific issue in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, noting that certain human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, were applicable in the occupied Palestinian territory, and that the protection they afforded did not cease in cases of armed conflict, save through the effect of provisions for derogation of the kind found in article 4 of the International Covenant on Civil and Political Rights. Of course, it must be borne in mind that some rights were non-derogable and there were stringent tests for derogation from rights that were not absolute based on necessity, timeliness and proportionality.

In paragraph 51, the Special Rapporteur had drawn the appropriate conclusions from the Court's advisory opinion in that case. Those issues should be properly highlighted in draft principle 19 and he therefore agreed with the suggestion by Mr. Murase and Mr. Saboia to add a paragraph or reference in that draft principle explicitly noting the applicability of human rights law to situations of occupation. The Special Rapporteur should perhaps provide clarification of her assertion in paragraph 60 regarding the ability of an occupying Power to temporarily intern civilians under the law of armed conflict, but not under human rights law. It was important to note that the right to freedom of movement under human rights law, which was clearly affected by internment, was not a non-derogable right. Therefore, under human rights law and the law of armed conflict, States, including occupying Powers, could intern civilians provided the conditions for suspension of that right were met.

While the applicability of human rights law in situations of occupation seemed to be undisputed, given the jurisprudence of the International Court of Justice and others, the applicability of environmental law in such situations appeared to be in question. He did not share the concern raised by some members in that regard, and agreed with the Special Rapporteur's legal reasoning in chapter II of the report, which used the connection between human rights and environmental rights to recognize the applicability of environmental protection in situations of occupation. That connection was strong for at least three reasons. First, as the Special Rapporteur had noted, the Court's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* implied the complementarity of environmental law in times of armed conflict. Therefore, since situations of occupation might be considered international armed conflicts for the purposes of international humanitarian law, it followed that customary international environmental law would be concurrently applied along with international humanitarian law and human rights law in such situations. Further, the opinions of regional courts, some of which were mentioned in the report, also demonstrated the co-applicability of environmental law. One example was the recent advisory opinion of the Inter-American Court of Human Rights on the environment and human rights, in which it had recognized the right to a healthy environment as a human right and extended the definition of jurisdiction in article 1 of the American Convention on Human Rights to include extraterritorial actions causing environmental harm in another State. That logic would likely extend to actions taken by an occupying Power that violated international environmental law to the detriment of the occupied State or a third State.

Second, under article 43 of the Hague Regulations, which was accepted as customary international law, an occupying State had the obligation to take all the measures in its power "to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". Therefore, it followed that environmental regulations in place in the occupied territory should also be respected and enforced, unless doing so was absolutely prevented by military necessity. It would be helpful to clarify, perhaps with examples from practice, what was meant by the

words "unless absolutely prevented". Additionally, as recognized in paragraph 78, the Commission's 2011 draft articles on the effects of armed conflicts on treaties indicated that treaty obligations, including environmental obligations, did not necessarily cease to apply in times of armed conflict.

Third, although some members had criticized the Special Rapporteur's reliance on the right to health in demonstrating the connection between human rights law, environmental law and the law of armed conflict, he agreed with her approach, which stemmed from the close relationship between the right to health and the right to life, the latter being a non-derogable right. Regarding the link between the right to life and the environment, the Special Rapporteur referenced several important cases, including the judgments of the Court of Justice of the Economic Community of West African States in *SERAP v. Nigeria* and the Inter-American Court of Human Rights in *Yanomami v. Brazil*. Those cases, combined with the jurisprudence of the International Court of Justice holding that occupying States retained their human rights law obligations in any territory where they exercised *de facto* control, supported the Special Rapporteur's reliance on the right to health in demonstrating the importance that should be attached to environmental rights in situations of occupation. It might also be worth considering the connection between the right to life and other important rights, such as the right to food. The *Paquete Habana* case of 1900 was an interesting example in that regard; the United States Supreme Court had cited lengthy legal precedents to support the existence of a customary international law that exempted fishing vessels from prize capture. That case expressed the broader principle that, even in times of war, situations of environmental damage that could affect the general population could not be ignored under customary international law.

He agreed with the Special Rapporteur that it was wise to address situations of occupation as a separate issue in the draft principles. As pointed out by Mr. Park, one of the challenges of codifying rules related to situations of occupation was the issue of determining when a situation of occupation had ended, but in his view that unique characteristic only reinforced the argument for addressing the issue separately. Concurrent application of the draft principles related to occupation and the draft principles in parts two and three should be addressed in the commentary rather than in the proposed draft principles themselves. Regarding the distinction between belligerent and pacific occupation, he shared the view of those members who considered that the Commission should avoid further narrowing the definition of occupation. He also wondered whether such a distinction might not be inconsistent with the previously adopted draft principles, which covered the variable periods of before, during and after conflict.

Mr. Park's suggestion to include potential occupations by international organizations was an interesting one and, based on the examples presented thus far, there seemed to be a modicum of practice that demonstrated that his concern was not purely theoretical. For example, the cholera outbreak introduced by United Nations peacekeepers in Haiti had allegedly resulted in more than 10,000 deaths. While those situations did not constitute occupation, they did show the need for regulation. In view of such experiences, he did not believe it was outside the realm of possibility that an international organization could at some point exercise control in a situation of occupation. He did not share the concerns that had been expressed regarding the applicability of the Geneva Conventions of 1949 and the Hague Regulations of 1907 to international organizations. Many, if not all, of the provisions of those instruments embodied customary international law and applied to international organizations. That being said, given the complexity of the topic, the Commission should adopt a cautious approach and avoid generalizations when it came to the applicability of the law of occupation to international organizations. Perhaps the issue should be addressed in the commentaries.

Turning to the individual draft principles, he agreed with the substance of draft principle 19 but would support adding the paragraph suggested by Mr. Murase concerning the applicability of human rights law to situations of occupation and clarifying in the commentary the use of the phrase "unless absolutely prevented". As the Special Rapporteur noted in her report, environmental regulation was, at least to some degree, a responsibility assumed by almost all States. However, it was important for such regulation to leave room for future developments in science and technology. Moreover, such developments must

involve a valid process of consultation, which had consequences for the recognition of the right to self-determination. At least when it came to enduring situations of occupation, compliance with the obligation under article 43 of the Hague Regulations to take all possible measures "to restore, and ensure, as far as possible, public order and safety" would likely give the occupying State grounds for adopting measures that it could claim were designed to improve environmental protection in the occupied State over time.

That being said, he also understood Mr. Rajput's concerns that the Commission should not strive to legitimize situations of occupation by creating rules that would seemingly only apply in protracted situations of occupation or that would affect the economic or social fabric of the occupied State. It was, of course, necessary to strike a balance between the international obligations applicable to the occupying and the occupied States.

He also supported the substantive elements of draft principle 20 and agreed with the Special Rapporteur that it followed the rules of customary international law codified in articles 43 and 55 of the Hague Regulations. The references to sustainable development and the concept of usufruct in paragraphs 31 and 91 of the report were very useful. He welcomed her acknowledgement of the relationship between the use of natural resources and the right to self-determination of the occupied State and her references to Protocol I additional to the Geneva Conventions of 1949. Article 55 of the Protocol expressly obliged States to take care to protect the natural environment against widespread, long-term and severe damage, and included a "prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population".

He did not share the concerns raised by previous speakers about the relevance of environmental protection to the concept of sustainable development, which was one of the most ubiquitous topics in the field of international environmental law. Article 4 of the Rio Declaration on Environment and Development very clearly recognized an obligation for the international community of States to enhance protection of the environment and article 7 provided for the concept of common but differentiated responsibilities, which permeated the discussion on sustainable development and environmental responsibilities. Thus, in his view, the balance to be struck in efforts to achieve sustainable development was between the right of developing countries to develop their economies and the right of all States and future generations to a functioning environment. Various aspects of environmental protection were also clearly enshrined in the Sustainable Development Goals. He therefore did not believe it was accurate to say that the concept of sustainable development did not include heightened environmental protection. While he agreed with other speakers that sustainability was to a great extent a political rather than a legal principle, reference should be made to the fact that some States had acquired legal obligations related to sustainable development through their commitments to mitigate the effects of climate change and other environmental harm in certain environmental agreements.

He also agreed with draft principle 21, establishing the duty of occupying States not to cause significant damage to the environment of other States or to areas beyond their effective control. That concept was set out in principle 21 of the Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) and principle 2 of the Rio Declaration on Environment and Development. As correctly stated by the Special Rapporteur, that draft principle corresponded to the concept of due diligence, which had been directly applied to the occupation context in the advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

With regard to future work, he fully supported the Special Rapporteur's decision to consider issues relating specifically to non-international armed conflicts. Taking into account the nature of numerous modern conflicts and their clear impact on the environment and the life and well-being of people, work on the topic would not be complete without addressing non-international armed conflicts.

In conclusion, he supported sending all three draft principles to the Drafting Committee, where he hoped that his suggestions would be taken into account.

The meeting rose at 1.05 p.m.